MALAYSIAN REPORTS

WEE TIANG TENG v. ONG CHONG HOOI & ANOR.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Wan Suleiman F.J.) January 10 & 11, and March 3, 1978]

[Kuala Lumpur — Federal Court Civil Appeal No. 107 of 1977]

Practice and Procedure — Limitation — Acknowledgment — Limitation Ordinance, 1953, ss. 6 and 26.

In this case the appellant claimed the benefits due under a staff provident fund. He had admitted being guilty of misconduct as a Manager of the bank and had been allowed to retire in April 1967. His benefits under the Staff Provident Fund Scheme were withheld pending settlement of possible claims. The action in this case was brought on August 13, 1974 and the defendants-respondents argued that it was time-barred. The appellant argued that he had received a letter dated June 24, 1971 from the Bank which stated in effect that his benefits would be withheld until outstanding claims on overdrafts were settled. The plaintiff-appellant claimed that this letter was an acknowledgment. The appellant's claim was dismissed and he appealed to the Federal Court.

Held, dismissing the appeal: the letter in question was not a sufficient acknowledgment. By it the defendants acknowledged that a claim had been made against them, they did not acknowledge that they were indebted to the plaintiff and even if it was an acknowledgment the debt acknowledged was not quantified in figures nor was it capable of ascertainment by calculation or by extrinsic evidence without further agreement of the parties. To take a demand out of the statute of limitation on the ground of acknowledgment, the language of the debtor must amount to an unequivocal admission of a subsisting debt, that is, subsisting at the time of its acknowledgment.

Cases referred to:-

(1) *Good* v. *Parry* [1963] 2 All E.R. 59.

(2) *Consolidated Agencies Ltd.* v. *Bertram Ltd.* [1965] A.C. 470.

The following authorities were also cited in argument: *Re Gee & Co. (Woolwich) Ltd.* [1974] 1 All E.R. 1149, 1157b, 1158f to h, 1160f3; 24 *Halsbury's* Laws of England, 3rd edition, 299, para. 593; *Hannah Maria Trulock* v. *John Robey* 59 E.R. 1186, 1188; *Jones & Bellgrove Properties Ltd.* (1949) 2 K.B. 700, 704 mid-page; *Dungate* v. *Dungate* [1965] 3 All E.R. 393, 395G, 397B, 818, 819, 820; *Prance* v. *Sympson* 60 E.R. 289 headnote, p. 291; *Surrendra* [1977] 1 W.L.R. 565, 571H, 574G; *Ainsworth* [1915] 2 Ch. 96, 105; *Flynn* [1969] 2 Ch. 403, 412, 2nd para; *Henry Trading* [1966] 2 M.L.J. 281, 282, 2nd column; *Dundee* [1952] 1 All E.R. 896, 903.

FEDERAL COURT.

Raja Abdul Aziz bin Raja Addruse (*Mohd. Dzaiddin bin Haji Abdullah* with him) for the appellant.

Chin Yew Meng for the respondent.

Wan Suleiman F.J.: The judgment of the court which I am about to read has been written by the Lord President.

Suffian L.P. (read by Wan Suleiman F.J.): The plaintiff was until some time in April, 1967, an employee of the Overseas Chinese Banking Corporation ("the bank"). He was a member of its Staff Provident Fund. He alleges that pursuant to the rules of the fund he was entitled to be paid within six months of leaving the bank the maximum benefit under the fund. The defendants, fellow employees of the bank, manage the fund. They refuse to pay the plaintiff anything; so the plaintiff sues them, claiming:

(1) maximum benefit under rule 10 of the fund;

(2) an account to be rendered by the defendants;

(3) interest on the maximum benefit; and

(4) other relief.

It is not disputed that the plaintiff was a member of the fund when he was with the bank, but the defendants deny that he was entitled to anything, as the plaintiff had admitted in a letter that he had been guilty of misconduct while serving as Acting Manager of the bank at Kota Bharu, Kelantan, such misconduct entitling the defendants to apply his benefit under the fund to make good any loss suffered by the bank under rule 10(2) of the rules of the fund.

This was a reference to a letter written by the plaintiff to the bank dated February 28, 1967, as follows:

"In view of my misdemeanour and misconduct and the irregularities allowed by me when I was Acting Manager of your Kota Bharu Branch, I wish to request you to allow me to retire from the service of the Bank as soon as possible.

I sincerely hope that the Directors will take my past long service into consideration and pay me an *ex-gratia* gratuity."

The defendants say that as they have paid out of the fund the plaintiff's benefit to the bank, the plaintiff's entitlement from the fund has been extinguished and there is nothing due to him.

Finally the defendants say that the plaintiff's claim is time-barred.

The defendants applied to court under Order 25 rule 2 for the issue of limitation to be disposed of first. The learned judge agreed, and held that the claim was barred by section 6 of the Limitation Ordinance, No. 4 of 1953.

The plaintiff appealed to us.

The plaintiff's action is founded on contract, and section 6(1)(a) of the Limitation Ordinance No. 4 of 1953 provides:

"... the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say — actions founded on a contract...."

As the plaintiff left the service of the bank in April, 1967, the defendants say that time began to run from that date and the action, having been brought on August 13, 1974, is time-barred. *Prima facie* that is correct. But the plaintiff had received a letter at page 58 of the record, and he says that that letter constituted an acknowledgment within section 26(2) of the Ordinance and therefore time began to run from the date of the letter which was June 24, 1974, and that being so, it is said, the action was not therefore time-barred. Section 26(2) reads:

"Where any right of action has accrued to recover any debt or other liquidated pecuniary claim... and the person liable or accountable therefor acknowledges the claim..., the right shall be deemed to have accrued on and not before the date of the acknowledgment...."

Thus the issue here is whether or not the letter of June 24, 1974, constituted an acknowledgment.

It is now necessary to refer to the correspondence between the parties.

Reference has already been made to the letter written by the plaintiff to the bank on February 28, 1967.

Thereafter on March 18, 1967, the defendants wrote to the plaintiff as follows:

"Dear Sir [plaintiff],

We beg to advise that the balance standing to the credit of your account on December 31, 1965, was $38,206.93 arrived at as shown under:—

Balance as at January 1, 1965	$32,601.45
*Bank's contribution 1965	1,440.00
Your contribution 1965	1,440.00
Interest for 1965 @ 8.36%	2,725.48
	38,206.93

We shall be glad if you would confirm this balance by signing and returning to us the annexed form.

Yours faithfully,
[defendants]

* This item is subject to the rules and regulations of the fund."

About four years later, on April 5, 1971, the plaintiff's solicitors wrote to the defendants as follows:

"Dear Sirs [plaintiff's solicitors],

re: *Mr. Wee Tiang Teng* [plaintiff]

We act for Mr. Wee Tiang Teng of Kota Bharu, Kelantan. We are instructed that our client who was formerly employed by Oversea-Chinese Banking Corporation Limited was during the period of his employment contributing to your Staff Provident Fund. We are further instructed that on March 18, 1967, you advised him by letter that the balance standing to his credit as on December 31, 1965 was $38,206.93, and from that date onwards our client has heard nothing from you.

In view of the above we would be grateful, if you could let us know the present amount standing to the credit of our client's account including interest thereof by return. We would also be grateful, if you could furnish us with a copy of your Rules and Regulations of the Fund, and we undertake to return the same after our perusal."

On June 24, 1971, the bank wrote to the plaintiff's solicitors a letter, the crucial letter, which, it is said on behalf of the plaintiff, constitutes an acknowledgment of the plaintiff's claim. That letter be it noted, came from the bank, not the defendants; but the parties agree that nothing turns on this, and that the letter is to be taken as emanating from the defendants. That letter reads as follows:

"Dear Sirs [plaintiff's solicitors],

re: *Mr. Wee Tiang Teng* [plaintiff]

With reference to your letter Ref: DZ/NC/41/71/62, dated May 25, 1971, we should like to acquaint you with the actions of your client during his term of office. As Acting Manager, he had granted:—

(a) Overdrafts over and above the approved limits;

(b) Unauthorised overdrafts.

By his actions, the Bank has been saddled with overdrafts which it has been attempting to recover ever since. In the case of one account, your client had given an undertaking to repay a monthly sum and he had failed to keep up with such payment.

So long as there is hope of recovering such unauthorised overdrafts, the Bank will continue with its efforts. Until it is certain that it is unable to recover the amounts which your client allowed to be overdrawn, it must withhold payment of his Provident Fund. Under the Rules, there is provision for the application of a member's fund first towards satisfaction of any loss occasioned to the Bank by the action of the member and for the balance, if any, in the absolute discretion of the Committee of the Fund, to be paid to the member.

We shall advise you further when it has been possible to determine the position of such unauthorised accounts."

On December 6, 1971, the plaintiff's solicitors wrote to the bank as follows:

"Dear Sir [the bank],

re: *Mr. Wee Tiang Teng* [plaintiff]

We refer to the above matter and have been instructed as follows:—

It appears from your letter of June 24, 1971 that the withholding of payment of the Provident Fund due to our client was on the premise that our client during his term of office with your Bank and in the capacity of Acting Manager, had granted:

(a) overdrafts over and above the approved limits;

(b) unauthorised overdrafts.

In the circumstances, we would be grateful, if you could forward us particulars of account and amount which you have alleged that our client had granted without the consent of the Bank.

Please let us hear from you as soon as possible."

On September 30, 1973, the plaintiff's solicitors wrote to the defendants as follows:

"Dear Sirs [the defendants],

re: *Mr. Wee Tiang Teng* [plaintiff]

We act for Mr. Wee Tiang Teng of Kota Bharu, Kelantan and refer you to our previous letters written on behalf of our client, namely, our letters of April 5 and December 6, 1971.

To-date our client has still to be paid the amount credited to his account in your provident fund; and as the matter has taken too long, we have been instructed to, and we do hereby, give notice that unless the moneys due to him are paid to us within fourteen (14) days from the receipt of this letter by you, our client will be instituting legal proceedings without further reference to you."

On October 4, the bank wrote to the plaintiff's solicitors a letter as follows (this letter was dated September 4, 1973, which is clearly a mistake for October 4, 1973, for it was stamped as having been received by the solicitors on October 7, 1973):

"Dear Sirs [plaintiff's solicitors],

re: *Mr. Wee Tiang Teng* [plaintiff]

We have just received your letter of September 30, 1973.

Before you proceed to take the course of action as advised by your client, you might enquire of him whether he has shown you copy of a letter dated February 28, 1967 which he wrote to our General Manager admitting his misdemeanour and misconduct and the irregularities he had permitted when he was Acting Manager of the Branch. In case he has not, we forward copy of such letter of your client for your information.

As he had caused the Bank a loss of some $59,467.61 on the accounts at the time excluding interest thereon, the Bank had to recover such loss from his provident fund under the Rules of the Fund, the provisions of which we had pointed out in our previous letters to you.

We await your reply, after you have consulted with your client."

Be it noted that if the amount standing to the plaintiff's credit in the fund on March 10, 1967, was $38,206.93, and if it is true that he had caused the bank a loss of $59,467.61 — as stated in the last letter — then under rule 10(2) of the fund the fund owes the plaintiff nothing. That rule reads:—

"(2) In the event of the determination of a member's employment by death or otherwise, ... if it shall be discovered that he has been guilty of any fraud, dishonesty, misconduct, or breach of duty, whereby the [bank] has suffered loss the retiring allowance to be raised and provided for such member shall be applied by the Committee first in or towards satisfaction of any loss or damage occasioned to the [bank] by his fraud, dishonesty, misconduct, or breach of duty, and the balance, if any, shall in the absolute discretion of the Committee be applied in the manner provided in Clause (3) of this Rule, or may be repaid to the Fund."

Section 26(2) of our Limitation Ordinance is *in pari materia* with section 23(4) of the English Limitation Act, 1939, and so English authorities are helpful

in determining the question before us — which is, as already stated, whether or not the letter of June 24, 1971, constitutes an acknowledgment within section 26(4).

In *Good* v. *Parry*[1] it was held by the English Court of Appeal that for there to be an acknowledgment of a claim within the English provision, there must be an admission that there is a debt or other liquidated amount outstanding and unpaid.

The facts there were that in 1949 a landlord let premises to a husband and wife. The husband died and the wife carried on the tenancy. In 1962 the landlord brought an action claiming more than six years' arrears of rent. In 1957 the tenant's agent had written a letter to the landlord during negotiations for the proposed purchase of the premises by the tenant, in which it was stated that "the question of outstanding rent can be settled as a separate agreement as soon as you present your account". The landlord contended that this "acknowledged the claim" for arrears of rent within section 23(4) of the Limitation Act, 1939, so that time would begin to run from the date of the letter. The Court of Appeal unanimously held that the letter was not an acknowledgment because there was in it no admission of any defined amount of rent or of any amount that could be ascertained by calculation being due, nor, indeed, any admission that there was such a debt in fact.

Lord Denning M.R. said at page 61 that the words "acknowledges the claim" in the English section 23(4) are not, perhaps, very happy. He continued:

"A person may acknowledge that a claim has been made against him without acknowledging any indebtedness. It is clear that what the Limitation Act, 1939, means is 'acknowledges the *debt* or other liquidated amount', ... there must be an admission that there is a debt or other liquidated amount outstanding and unpaid. Even though the debtor says in the same writing that he will never pay it, nevertheless it is a good acknowledgment. In order to be an acknowledgment, however, the debt must be quantified in figures, or, at all events, it must be liquidated in this sense that it is capable of ascertainment by calculation, or by extrinsic evidence, without further agreement of the parties....

No doubt a promise in writing by a debtor to pay whatever sum is found due on taking an account is a good acknowledgment today... provided always that the amount is a mere matter of calculation from vouchers, or can be ascertained by extrinsic evidence, and is not dependent on the further agreement of the debtor."

Turning to the letter in question in that case, Lord Denning said at page 62:

"I am quite satisfied that there is no acknowledgment, because there is no admission of any rent of a defined amount due, or of any amount that can be ascertained by calculation. The amount is uncertain altogether. Nor can I regard it as a promise to pay whatever amount may be due on taking an account. The tenant clearly reserves the right to examine it and not to be bound except by separate agreement."

Davies L.J. agreed with the trial judge when he said that "the letter did not acknowledge the claim; it only acknowledged that *there might be a claim*".

With respect we are of the opinion that the letter in question before us was not a sufficient acknowledgment within our section 26(2). By it the defendants acknowledged that a claim had been made against them, they did not acknowledge that they were indebted to the plaintiff, and even if it was an acknowledgment the debt acknowledged was not quantified in figures, nor was it capable of ascertainment by counterclaim or by extrinsic evidence *without further agreement of the parties.*

There are three kinds of acknowledgment:

(1) an acknowledgment by the debtor that a debt subsisted in the past but not at the time of the acknowledgment;

(2) an acknowledgment that it subsists at the time of the acknowledgment; and

(3) an acknowledgment that it may subsist in the future but not at the time of the acknowledgment.

In *Consolidated Agencies Ltd.* v. *Bertram Ltd.*[2] the Privy Council at page 482 approved the following statement of an author on the law of limitation:—

"To take a demand out of the statute of limitation on the ground of an acknowledgment, the language of the debtor must amount to an unequivocal admission of a subsisting debt, that is subsisting *at the time of the acknowledgment.*"

Though that was a decision on the Indian Limitation Act, 1908, we would respectfully follow the principle therein stated, since the acknowledgments of kinds (1) and (3) are not really admissions that the debtor *is* indebted to the creditor.

The letter in question, in our view, is not an unequivocal admission of a debt subsisting at the time of the acknowledgment, but one that might subsist in the future, contingent on there being *any* balance left, due from the fund to the plaintiff, after the bank's losses have been made good. On the date of the letter the extent of the bank's loss was not known and consequently the exact amount of any balance due from the defendants to the plaintiff was not known either; and the exact ascertainment of this amount was wholly dependent on the separate agreement of the defendants.

We would therefore dismiss this appeal with costs and order that the appellant's deposit be paid to the respondents against their taxed costs.

Appeal dismissed.

Solicitors: *Dzaiddin & Co.; Allen & Gledhill.*